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AN AGENT'S RIGHT TO SUE UPON CONTRACTS.

I.

SEC. 1. IN GENERAL.——RIGHT OF ACTION IN PRINCIPAL ALONE.—It is ordinarily the function and the duty of an agent in his contractual dealings for his principal, to act not only for and on account of his principal, but in the principal's name. Where the contract is express and formal, and particularly where it is in writing, there is ordinarily no difficulty in determining whether this requirement has been complied with. Even though the dealings are not express and formal, the function and the duty of the agent are still the same, and there is a constant presumption that a known agent, acting as such, intends to impose the obligations of the contract upon the principal and secure its advantages to him. The effect of the proper discharge of the agent's duty in such cases, therefore, is to invest the principal with the right to all the benefits and advantages which result from it, to invest him with the legal interest in the contract, and to clothe him with the power to bring all necessary actions to enforce the contract. As a general rule, therefore, where the contract is thus made for and on account of the principal and in his name, and the agent has no beneficial interest in the contract, the right of action upon the contract is in the principal alone and the agent cannot sue upon it.[1]

[1] Evans v. Evans, 3 Ad. & El. 132; Buckbee v. Brown, 21 Wend. (N. Y.) 110; Garland v. Reynolds, 20 Me. 45; Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Medway Cotton Manufactory v. Adams, 10

SEC. 2.——CONSIDERATIONS AFFECTING THIS RULE.—But it has been seen that, notwithstanding the fact that the agent has authority, and is expected to bind the third person with whom he deals, to the principal, yet, through failure to disclose his principal, or to use apt and appropriate language, or from a deliberate intention to deal with the agent exclusively, the result of the negotiation may be that the third person has assumed obligations, either *prima facie* or exclusively, to the agent alone. It may thus happen that the legal interest in the contract will be, or will appear to be, in the agent alone, and, in accordance with the well-settled rule that an action upon a contract is to be brought in the name of the party in whom the legal interest in the contract is vested, the right of action may be either in the agent alone, or it may be subject to an action by the agent or the principal. This question as to the agent's right of action may arise under a variety of circumstances. Thus the contract may be (*a*) an unwritten one, or it may be (*b*) a written contract, and if in writing, it may

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Mass. 360; Gunn v. Cantine, 10 Johns. (N. Y.) 387; Chin Kem You v. Ah Joan, 75 Cal. 124, 16 Pac. 705; Moses v. Ingram, 99 Ala. 483, 12 So. 374; Chamberlain v. Amter, 1 Colo. Ap. 13, 27 Pac. 87; Fay v. Walsh, 190 Mass. 374, 77 N. E. 44; Morton v. Stone, 39 Minn. 275, 39 N. W. 496; Denver Produce Co. v. Taylor, 73 Miss. 702, 19 So. 489; Whitehead v. Potter, 26 N. Car. 257; Davenport v. Ash, 121 La. 210, 46 So. 213; Wurzburg v. Webb, 19 Nov. Sco. 414.

"Prima facie," says Blackburn, J., in Fisher v. Marsh, 6 B. & S. 411, "when an agent makes a contract for a person named, the principal and not the agent is considered as making the contract."

An agent who ships by the carload the goods of several principals to a foreign commission merchant for sale, with the understanding that the proceeds of each owner's goods, less the commissions, shall be remitted directly to him, the names and quantities received from each owner being separately entered on the shipping bill, and each owner's goods also being marked in his own name, cannot maintain an action in his own name against the commission merchant for damages caused by delay in selling the goods, even though the shipment was made in the agent's name. The contract is not to be found in the mere act of shipment, but from all the facts and circumstances of the case. So considered, it was held that the contract was not made either in the name of the agent as principal or as the representative of undisclosed principals. Denver Produce & Commission Co. v. Taylor, 73 Miss. 702, 19 So. 489.

Where goods are shipped to an agent to deliver, on a contract made with the principal, the agent cannot maintain an action for the price. Phillips v. Henshaw, 5 Cal. 509.

After termination of the agency.—Where an agent had deposited his principal's money in a bank in the name of "A. J. Miller, Agent," it was held that, whether he could or could not have sued for it while his agency continued, he certainly could not do so after his agency had been terminated by the principal's bankruptcy. Miller v. State Bank, 57 Minn. 319, 59 N. W. 309.

be (*c*) under seal. So in his negotiation the agent may have acted (*a*) as the agent of a known principal, or (*b*) he may have disclosed the fact of his agency, but concealed the name of his principal, or (*c*) he may have bargained as the real principal. In doing so, he may have acted (*a*) with the express or implied authority of his principal to keep the principal concealed, or (*b*) against the principal's express or implied desire. So the contract upon which the question arises may be (*a*) fully executed, or (*b*) partially executed, or (*c*) wholly executory. There may, of course, also be cases in which, though the contract was not originally made with the agent at all, the principal may since have clothed the agent with an authority or a title to sue.

Each of these cases may justify consideration.

SEC. 3.——AGENT MAY SUE WHEN PRINCIPAL HAS CLOTHED HIM WITH TITLE OR AUTHORITY FOR THAT PURPOSE. —In the first place it may be noticed that the power of the agent to sue is not necessarily confined to the cases in which the agent was originally a party to the contract. If the principal, having contract rights, assign the contract to the agent in such a way as to vest in him the legal title,[2] in a state wherein the assignee of a chose in action may sue in his own name; or if the principal, having bonds or notes or other negotiable instruments, endorse and deliver them to the agent so as to vest in him the legal title,[3]

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[2] Where a judgment paid by a surety is assigned to an agent for collection, the agent is the real party in interest and can collect the judgment. Searing v. Berry, 58 Ia. 20, 11 N. W. 708. Likewise where one in whose favor judgment has been rendered assigns to an agent for collection. Cottle v. Cole, 20 Ia. 481. Where an account is assigned for collection the assignee can sue in his own name. Sheridan v. Mayor, 68 N. Y. 30.

[3] In Bell v. Tilden, 16 Hun (N. Y.), 346, a draft endorsed in blank to the principals was handed over to an agent for collection. *Held:* The mere handing over of the draft did not pass the legal title and this is necessary for the agent to sue. In Iselin v. Rowlands, 30 Hun (N. Y.), 488, endorsement and handing over of drafts to agent for collection did not invest sufficient title to sue. In Hays v. Hathorn, 74 N. Y. 486, held that mere handing over for collection of note endorsed in blank was not sufficient to enable agent to sue. But where it is clear that the bare legal title has passed for the purpose of collection the agent can sue: Hunter v. Allen, 106 N. Y. App. Div. 557, 94 N. Y. Suppl. 880, where note was endorsed to agent for collection. In Leach v. Hill, 106 Ia. 171, 76 N. W. 667, where a check had been endorsed to a bank and a guaranty made by third person that it would be paid, the cashier, as such, was allowed to sue. Note endorsed in blank for collection passes sufficient legal title to enable agent to sue. Boyd v. Corbitt, 37 Mich. 52; O'Brien v. Smith, 1 Black (66 U. S.), 99; Abell Note Co. v. Hurd, 85 Ia. 559, 52 N. W. 488. Where municipal

the agent may sue in his own name. The test of the sufficiency of the agent's right to sue in such cases seems to be whether his title is sufficient to protect the other party in responding to the agent's claim.[4] The fact that the agent's recovery is to be for the benefit of the principal, and that therefore the principal is the real party in interest would not defeat the agent's action, since most of the statutes contain exceptions which would cover such a case.[5] A mere agent for collection, however, not having been vested with the legal title, would have no right to sue in a state wherein the action must be in the name of the real party in interest.[6]

It has, nevertheless, been held in several cases,—statutes requiring action by the real party in interest not being involved—that the principal may confer authority upon an agent to sue for and recover claims belonging to the principal in the agent's own name.[7]

SEC. 4.——AGENT MAY SUE ON CONTRACT MADE WITH HIM PERSONALLY.—Where the contract is made with the agent

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bonds, transferable by delivery, are handed over to an agent to collect, he may sue in his own name. Village of Kent v. Dana, 100 Fed. 56; Salmon v. Rural Ind. School Dist., 125 Fed. 235.

[4] In Sheridan v. Mayor, *supra*, the court said: "It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment to or recovery by the assignee." Same statement in Hunter v. Allen, *supra*.

[5] See Cottle v. Cole, 20 Ia. 481; Village of Kent v. Dana, 100 Fed. 56; Leach v. Hill, 106 Ia. 171, 76 N. W. 667; Abell Note Co. v. Hurd, 85 Ia. 559, 52 N. W. 488; Salmon v. Rural Ind. School Dist., and other cases *supra*.

[6] See *supra:* Bell v. Tilden, Iselin v. Rowlands, Hays v. Hathorn, Barkley v. Wolfskehl, 25 N. Y. Misc. Rep. 420, 54 N. Y. Suppl. 934.

[7] In Eggleston v. Colfax, 4 Martin (La.), N. S. 481, an agent authorized to collect a claim due to his principal was held entitled under the power of attorney filed with the petition, but not given in the report, to maintain an action in his own name. The court held there was no objection to his maintaining the action in his capacity as agent, and that a judgment in his own name would have the same effect as *res adjudicata* as though the action had been brought in the name of the principal. In Frazier v. Willcox, 4 Rob. (La.) 517, the same holding was made. The court said: "A power to sue, to collect a debt, to give an acquittance, may be deputed, and an action may be maintained in the name of the agent as well as in that of the principal when power is given to that effect. The debtor will be protected if the power to receive is sufficient." In Kendall v. Calder, 2 Tex. Unrep. Cases, 732, an agent authorized to collect money belonging to his principal was permitted to recover it in an action in his own name. In Varney v. Hawes, 68 Me. 442, it was held that a man may mortgage to an agent in order to procure credit from his principal, and that the agent may enforce the mortgage as the trustee of his principal.

personally, whether as a result of an omission to disclose the fact of the agency or the name of the principal, or of failure to use apt and sufficient language to bind the principal, or of a deliberate intention to deal with the agent alone, the latter is, as has been seen, personally liable upon the contract, even though the principal also may in many cases be liable upon it. And this obligation is reciprocal,—the other party is bound to the agent, and in the latter vests a legal interest in the contract, and, consequently, a right of action upon it, though his recovery is, of course, ordinarily for the benefit of his principal. It is, therefore, a general rule that where a contract, whether written or unwritten, entered into on account of the principal, is, in terms, made with the agent personally, the agent may sue upon it at law.[8] At the same time, as will be seen hereafter, by what are, in many cases, wholly

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[8] Fisher v. Marsh, 6 B. & S. 411; Kennedy v. Gouveia, 3 Dowl. & R. 503; Parker v. Winlow, 7 El. & Bl. 942; Dutton v. Marsh, L. R. 6 Q. B. 361; Grisby v. Nance, 3 Ala. 347; Bird v. Daniel, 9 Ala. 302; Goodman v. Walker, 30 Ala. 482, 68 Am. Dec. 134; Shelby v. Burrow, 76 Ark. 558, 89 S. W. 464; 1 L. R. A. (N. S.) 303; Potter v. Yale College, 8 Conn. 51; Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359; Brown v. Sharkey, 93 Ia. 157, 61 N. W. 364; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Colburn v. Phillips, 13 Gray (Mass.) 64; Buffum v. Chadwick, 8 Mass. 103; Borrowscale v. Boswarth, 99 Mass. 378; Van Staphorst v. Pearce, 4 Mass. 258; Harp v. Osgood, 2 Hill (N. Y.), 216; Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835; Alsop v. Caines, 10 Johns. (N. Y.) 396; Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451; Doe v. Thompson, 22 N. H. 217.

In Rowe v. Rand, 111 Ind. 206, 12 N. E. 377, Niblack, J., lays down the rule as follows: "An agent may sue in his own name: *First,* When the contract is in writing, and is expressly made with him, although he may have been known to act as agent. *Secondly,* When the agent is the only known or ostensible principal and is, therefore, in contemplation of law the real contracting party. *Thirdly,* When, by the usage of trade, he is authorized to act as owner or as a principal contracting party, notwithstanding his well known position as agent only. But this right of an agent to bring an action, in certain cases in his own name, is subordinate to the rights of the principal, who may, unless in particular cases, where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent."

In Short v. Spackman, 2 B. & Ad. 962, the plaintiffs, brokers, bought goods of defendant, on account of and by the authority of H. The purchase was made in their own names, but the defendant was notified that there was an unnamed principal. The plaintiffs afterwards, under a general authority from H, contracted in their own names for a resale of the goods. H repudiated the whole transaction, in which plaintiffs acquiesced. *Held:* H's repudiation was no objection to plaintiffs' recovery for the damages sustained by not being able to carry out their contract of resale.

In Equity.—Under the general equitable rule that actions shall be prosecuted by the real parties in interest, a mere agent having only a legal interest, could not sue. See Fry on Specific Performance, § 264; Morton v. Stone, 39 Minn. 275.

anomalous rules, the principal has also a right of action upon the contract which usually is paramount to that of the agent.

SEC. 5.——UNDISCLOSED PRINCIPAL.—This rule is of frequent application in the case of the agent of an undisclosed principal.[9] In 1833, Denman, C. J., said: "It is a well established rule of law that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it."[10] In such a case the agent is the ostensible party to the contract; the other party may hold him liable upon it, although, as has been seen, the principal may also usually be held liable when discovered; and, as such ostensible party, the agent may enforce the contract, subject in most cases, as will be seen, to a paramount right in the principal to enforce it himself if he so prefers.

SEC. 6.——DISCLOSED PRINCIPAL.—But the rule also applies although both the fact of the agency and the name of the principal were disclosed. If the fact that the agent acts as such appears, but the name of the principal does not appear, the action may be sustained in the name of the agent as the only party disclosed to whom the promise is made.[11] And so, although the name of the principal appears, this fact is not conclusive of the absence of the agent's power to sue. The question here, as in the cases that have been considered, is, are the words used in respect to the principal descriptive of the person merely, or do they declare that the promise runs to the principal directly.[12]

[9] Sims v. Bond, 5 B. & Ad. 389; Lapham v. Green, 9 Vt. 407; Colburn v. Phillips, 13 Gray (Mass.) 64 (citing many cases); Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; Alsop v. Caines, 10 Johns. (N. Y.) 396; Ludwig v. Gillespie, 105 N. Y. 853, 11 N. E. 635; Gray v. Pub. Co., 2 N. Y. Misc. Rep. 260, 21 N. Y. Supp. 967; Manette v. Simpson, 61 Hun 620, 15 N. Y. Supp. 448; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Stockbarker v. Sain, 69 Ill. App. 436; Hewitt v. Torson, 124 Ill. App. 375; Stewart v. Gregory, 9 N. Dak. 618, 84 N. W. 553; National Bank v. Nolting, 94 Va. 263, 26 S. E. 826; Neal v. Andrews (Tex. Civ. App.), 60 S. W. 459.

In the following case the court put the decision on both common law and statute: Simmons v. Wittmann, 113 Mo. App. 357, 88 S. W. 791.

[10] In Sims v. Bond, *supra*.

[11] Clap v. Day, 2 Greenl. (Me.) 305, 11 Am. Dec. 99; Cocke v. Dickens, 4 Yerger (12 Tenn.), 29, 26 Am. Dec. 214; Buffum v. Chadwick, 8 Mass. 103. *An equitable action* for specific performance of the contract cannot be maintained by the agent: Morton v. Stone, 39 Minn. 275.

[12] See Considerant v. Brisbane, 22 N. Y. 389; Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451, and cases cited; Leach v. Hill, 106 Ia. 171, 76

SEC. 7.——STATUTES REQUIRING SUIT BY REAL PARTY IN INTEREST.—The agent's right to sue in these cases is not defeated by the statutory provisions found in many of the states that actions shall be brought in the name of the real party in interest; since these statutes either contain express exceptions, or, under the right of a trustee of an express trust to sue, provide such comprehensive definitions of such a trustee as to include an agent who has made a contract for his principal.[13]

SEC. 8.——ASSIGNEES OF BANKRUPT AGENT.—Where the agent has no beneficial interest of his own in the subject matter, his right to sue does not, upon his bankruptcy, pass to his assignees.[14]

SEC. 9.——ILLUSTRATIONS OF RULE PERMITTING AGENT TO SUE.—These principles are of frequent application to the

N. W. 667. But a mere broker contracting for a disclosed principal cannot sue upon the contract: Fairlie v. Fenton, L. R. 5 Ex. 169.

[13] The New York statute provides as follows: "Every action must be prosecuted in the name of the real party in interest. . . . A trustee of an express trust . . . may sue without joining with him the person for whose benefit the action is brought. A person with whom, or for whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." The statutes in the other States are substantially similar. Under these statutes it is held that the agent may sue.

Hollingsworth v. Moulton, 53 Hun 91, 6 N. Y. Supp. 362; Coffin v. Grand Rapids Co., 61 N. Y. Super. Ct. 51, 18 N. Y. Supp. 782; Gray v. Journal of Finance Pub. Co., 2 N. Y. Misc. Rep. 260, 21 N. Y. Supp. 967; Melcher v. Kreiser, 28 N. Y. App. Div. 362, 51 N. Y. Supp. 249; Schipper v. Milton, 51 N. Y. App. Div. 522, 64 N. Y. Supp. 935; Crouch v. Wagner, 63 N. Y. App. Div. 526, 71 N. Y. Supp. 607; Considerant v. Brisbane, 22 N. Y. 389; Simons v. Wittmann, 113 Mo. App. 357; Stillwell v. Hamm, 97 Mo. 579, 11 S. W. 252; Wolfe v. Mo. Pac. Ry. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. R. 339, 3 L. R. A. 539; Simon v. Trummer (Ore.), 110 Pac. 786; Cremer v. Wimmer, 40 Minn. 511, 42 N. W. 467; Close v. Hodges, 44 Minn. 204, 46 N. W. 335; Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099; Brannon v. White Lake Tp., 17 S. D. 83, 95 N. W. 284; Abell Note Co. v. Hurd, 85 Iowa, 559, 52 N. W. 488; Faust v. Goodnow, 4 Colo. App. 352, 36 Pac. 71; Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696; McLaughlin v. First Nat. Bank, 6 Dak. 406, 43 N. W. 715; Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354. The rule in the federal courts is the same as in the state where the statute prevails. Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451. In the following cases the court rested its decision both on the common law and on the statute: McLaughlin v. First Nat. Bk. of Deadwood, 6 Dak. 406, 43 N. W. 715; Considerant v. Brisbane, 22 N. Y. 389; Melcher v. Kreiser, 28 N. Y. App. Div. 362, 51 N. Y. Supp. 249. In Ward v. Ryba, 58 Kan. 741, 51 Pac. 223, it was held that such a statute did not authorize an action of replevin by an agent in his own name, to recover possession of his principal's goods taken from his possession, there being no allegation of any special interest or right to possession in the agent.

Under the Idaho statute, see Lawyer v. Post, 47 C. C. A. 491, 109 Fed. 512.

[14] Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332.

case of commercial paper. Thus upon a note or bill payable to "A. B., agent," or to "A. B., agent for C. D.," or to "A. B., trustee," or to "A. B., executor," etc., or to "A. B., for the use of C. D.," the action may be maintained in the name of A. B.[15]

The same rule applies to a promise made to "A. B., cashier," or "A. B., president of C. D. Company." In such cases the action may be brought in the name of the officer, although it is now generally held that the corporation also may sue.[16]

But where the promise is made to the "agent of C. D.," or the "cashier of the E. Bank," or to the "treasurer of the F. Co.," and the like, the name of the agent or officer not being disclosed, it is usually regarded as made to the principal directly.[17]

SEC. 10.——So where an agent carries on business for his principal and appears to be the proprietor and sells goods as the apparent owner, he can sustain an action in his own name for the price.[18] And where the principal carries on business in the name of the agent, actions may be sustained in the name of the agent upon contracts made to him in that name.[19] So where an agent ships goods, taking the bill of lading in his own name, he may sue upon the contract of carriage for damages arising from a breach of it.[20] So one who describes himself as agent,

[15] Clap v. Day, 2 Greenl. (Me.) 305, 11 Am. Dec. 99; Buffum v. Chadwick, 8 Mass. 103; Goodman v. Walker, 30 Ala. 482; Pierce v. Robie, 39 Me. 205; Rutland, &c., R. R. Co. v. Cole, 24 Vt. 33; Cocke v. Dickens, 4 Yerg. (Tenn.) 29, 26 Am. Dec. 214; Van Staphorst v. Pearce, 4 Mass. 258; Shepherd v. Evans, 9 Ind. 260; Rose v. Laffan, 2 Speers (S. C.) 424; Alston v. Heartman, 2 Ala. 699; Horah v. Long, 4 Dev. & Bat. (N. C.) 274.

[16] Fairfield v. Adams, 16 Pick. (Mass.) 381; Johnson v. Catlin, 27 Vt. 87. That principal also may sue, see Baldwin v. Bank of Newbury, 1 Wall. (U. S.) 239; First Nat. Bank v. Hall, 44 N. Y. 395; Garton v. Union City Bank, 34 Mich. 279; Barney v. Newcomb, 9 Cush. (Mass.) 46; Rutland, &c., R. R. Co. v. Cole, 24 Vt. 33.

[17] Commercial Bank v. French, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; Ewing v. Medlock, 5 Port. (Ala.) 82; Alston v. Heartman, 2 Ala. 699; Harper v. Ragan, 2 Blackf. (Ind.) 39; Crawford v. Dean, 6 Id. 181; Vermont Central R. R. Co. v. Clayes, 21 Vt. 31; Pigott v. Thompson, 3 Bos. & P. 147.

[18] Gardiner v. Davis, 2 Car. & P. 49; Dancer v. Hastings, 4 Bing. 2; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

[19] Alsop v. Caines, 10 Johns. (N. Y.) 396.

[20] Joseph v. Knox, 3 Camp. 320; Blanchard v. Page, 8 Gray (Mass.), 281; Hooper v. Chicago, &c., Ry. Co., 27 Wis. 81, 9 Am. Rep. 439; Dunlop v. Lambert, 6 Cl. & Fin. 600; Southern Express Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4; Finn v. Western R. R. Co., 112 Mass. 524, 17 Am. Rep. 128; Carter v. Sou. Ry. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354; Richmond, &c., D. R. Co. v. Bedell, 88 Ga. 591, 15 S. E. 676. An agent who has made a contract in his own name for the receipt of goods and their shipment

but covenants as in his own right, may maintain an action in his own name against the other party upon the covenants.[21] And a broker may sue a telegraph company in his own name for a breach of contract to transmit an order, in his own name, though on behalf of his principal, for the purchase or sale of goods;[22] an agent who, having sold his principal's land, remits the money by express, may sue the express company for a loss of the money through its negligence;[23] and one who has insured property as agent may sue in his own name to recover upon the policies.[24]

SEC. 11.——An agent who sells his principal's goods, not as agent but as principal, may sue the purchaser for the price,[25] or for refusing to perform the contract.[26] Upon a contract for the purchase made by the agent in his own name, the agent may sue to recover damages for the seller's failure to deliver the goods.[27] An agent who has in his own name leased land for his principal may sue to recover the rent reserved.[28] An agent who has performed services for another, *e. g.* the threshing of grain, in pursuance of a contract made in his own name, may sue to

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from a certain place may maintain an action against the carrier upon the contract. Georgia S. & F. Ry. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961. In an action sounding in tort, the action must be brought by the party having an interest in the goods. Thompson v. Fargo, 49 N. Y. 188, 10 Am. Rep. 342; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402.

[21] Potts v. Rider, 3 Ohio 70, 17 Am. Dec. 581. Upon a contract made between "Gustaf Lundberg, agent for N. M. Hoglund's Sons & Co.," and "Albany and Rensselaer Iron & Steel Co.," signed "Gustaf Lundberg," "Albany and Rensselaer Iron & Steel Co.," Lundberg may sue in his own name. Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451; citing Kennedy v. Gouveia, 3 D. & R. 503; Parker v. Winlow, 7 E. & B. 942; Dutton v. Marsh, L. R. 6 Q. B. 361; Buffum v. Chadwick, 8 Mass. 103; Packard v. Nye, 2 Metc. (Mass.) 47; distinguishing Gadd v. Houghton, 1 Ex. Div. 357, 18 Eng. Rep. 361; and Oelricks v. Ford, 23 How. (U. S.) 49.

[22] United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

[23] Snider v. Adams Express Co., 77 Mo. 523.

[24] The Hamburg-Bremen Fire Insurance Co. v. Lewis, 4 App. D. C. 66; Marine Ins. Co. v. Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. R. 191; Deitz v. Ins. Co., 31 W. Va. 851, 8 S. E. 616; Murdock v. Ins. Co., 33 W. Va. 407, 10 S. E. 777.

[25] Keown v. Vogel, 25 Mo. App. 35; Stockbarger v. Sain, 69 Ill. App. 436; Coggburn v. Simpson, 22 Mo. 351.

[26] Davis v. Harness, 38 Ohio St. 397; Tustin Fruit Ass'n v. Earl Fruit Co., (Cal.) 53 Pac. 693.

[27] Colburn v. Phillips, 13 Gray (Mass.) 64.

[28] Manett v. Simpson, 61 Hun 620, 15 N. Y. Supp. 448; Spence v. Wilson, 102 Ga. 762, 29 S. E. 713.

recover the agreed compensation.[29] An agent entrusted with the management of funds and who has loaned money and taken securities in his own name may sue in his own name to recover the money and enforce the securities.[30]

SEC. 12.——AGENT MAY SUE WHEN HE HAS A BENEFICIAL INTEREST.—Mr. Chitty lays down the rule[31] which has often been cited, that "when an agent has any beneficial interest in the performance of the contract, as for commission, etc., or a special property or interest in the subject matter of the agreement, he may support an action in his own name upon the contract,[32] as in the case of a factor or a broker,[33] or a warehouseman or carrier,[34] an auctioneer,[35] a policy broker whose name is on the policy, [36] or the captain of a ship for freight."[37] So in another English book,[38] in which, in conformity with the rule of the preceding section, it is laid down that an agent may sue in his own name on contracts made by him on behalf of his principal, where the agent contracts personally, an additional class of cases is also mentioned in which the agent may sue, viz., "where, as in the

[29] Hewitt v. Torson, 124 Ill. App. 375. An agent who has deposited his principal's money in a bank in his own name may maintain an action to recover the sum so deposited. National Bank v. Nolting, 94 Va. 263, 26 S. E. 826.

[30] Dawson v. Burrus, 73 Ala. 111.

[31] 1 Chitty on Pleadings, 8 (16 Am. Ed.).

[32] Citing Porter v. Raymond, 53 N. H. 519; Treat v. Stanton, 14 Conn. 445; Barnes v. Ins. Co., 45 N. H. 21; Underhill v. Gibson, 2 N. H. 352; Tankersley v. Graham, 8 Ala. 196; Butts v. Collins, 13 Wend. (N. Y.) 139; Colburn v. Phillips, 13 Gray (Mass.), 64; Borrowscale v. Bosworth, 99 Mass. 378, 383.

[33] Citing Grove v. Dubois, 1 T. R. 112; Atkyns v. Amber, 2 Esp. 493; Williams v. Millington, 1 H. Bl. 82; George v. Clagett, 7 T. R. 359; Johnson v. Hudson, 11 East. 180; Sadler v. Leigh, 4 Camp. 195; Morris v. Cleasby, 1 M. & S. 581; Sailly v. Cleveland, 10 Wend. (N. Y.) 156.

[34] Citing per Lord Ellenborough in Martini v. Coles, 1 M. & S. 147.

[35] Citing Williams v. Millington, 1 H. Bl. 81; Coppin v. Craig, 2 Marsh. 501; Farebrother v. Simmons, 5 B. & Ald. 333; Grice v. Kenrick, L. R. 5 Q. B. 340.

[36] Citing Park on Ins. 403; Grove v. Dubois, 1 T. R. 112; Hagedorn v. Oliverson, 2 M. & S. 485; Garrett v. Handley, 4 B. & C. 666; Cumming v. Forester, 1 M. & S. 497; Mellish v. Bell, 15 East 4; Ward v. Wood, 13 Mass. 539; Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76; Farrow v. Commonwealth Ins. Co., 18 Id. 53; Rider v. Ocean Ins. Co., 20 Id. 259; Williams v. Ocean Ins. Co., 2 Metc. (Mass.) 303; Somes v. Equitable Ins. Co., 12 Gray (Mass.) 531.

[37] Citing Shields v. Davis, 6 Taunt. 65; Brown v. Hodgson, 4 Taunt. 189.

[38] Bowstead on Agency, 3 Ed., 400-401.

case of factors and auctioneers, he has a special property in, or a lien upon the subject matter of the contract, or has a beneficial interest in the completion thereof."

SEC. 13.——Just how much is meant by the rule in either case is not entirely clear. If the contract has been made with the agent personally, he needs no additional reason to enable him to sue. No case has been found which holds that where the contract is made in the principal's name, the agent may sue upon the contract merely because he has an interest in its performance, except perhaps where he sues because of the loss of incidental benefits personal to himself.[39] On a contract made for his benefit, but to which he was not a party, he might or might not be able to sue according to the state in which the question arose. If the action were in tort a special property might sustain an action, but the question here involves actions of contract only. The rule might very well mean that, in determining whether the contract was made with the principal or the agent, under the doctrine laid down in Section 4 above, the fact that the agent had an interest may show that the contract was made with him;[40] or that in applying the rule that the action

[39] In Bleecker v. Franklin, 2 E. D. Smith (N. Y.) 93, it was held that where the terms of a sale made by an auctioneer require that his fees should be paid by the purchaser, he may maintain an action against the purchaser, for such fees in his own name. So, in Livermore v. Crane, 26 Wash. 529, 67 Pac. 221, it was held that a real estate broker, who, in pursuance of a contract made with a prospective purchaser, procured a contract of sale to be entered into between the owner of land and such prospective purchaser, may maintain an action for damages for the loss of his commissions against the purchaser for failure to carry out such agreement, although he had agreed to look to the vender for his commissions. The cases of Cavender v. Waddingham, 2 Mo. App. 551; and Atkinson v. Pack, 114 N. C. 597, 19 S. E. 628, were relied upon. In Evrit v. Bancroft, 22 Ohio State 172, plaintiff, an agent to sell his principal's land and receive as commission all money over a certain price, and who had entered into a contract in his own name with defendant, was not allowed to recover the amount of commission he would have received had defendant performed, it not appearing that the principal had been damaged by the defendant's breach. In Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946, plaintiff, who was to get a commission from his principal out of the purchase price of land, was not allowed to recover against the purchaser for breach of a contract made in the principal's name.

[40] This idea, that a nominal party may become the real party by reason of some special interest, seems to underly many of the cases. Thus in Porter v. Raymond, 53 N. H. 519, 526, the court says, "The authorities seem uniform that, where the nominal promisee is an agent and has a beneficial interest in the performance of the contract or a special property in the subject-matter of the agreement, the legal interest and right of action is in him."

must be brought in the name of the real party in interest, the fact that the agent has an interest would enable him to sue where an agent without interest might not be allowed to sue, although the contract was nominally made with him.[41] In practically all of the cases in which this rule was originally laid down, the contracts had either been made in the agent's name or involved the dealings of an agent like a factor, who is impliedly authorized to sell in his own name and is therefore given the right to recover the price, or who had come under some obligation to the principal, like the factor who sells under a *del credere* commission or the auctioneer who has given credit for the price without authority, and who is given the right of action for the price in order that he may recoup himself.[42] All these cases seem in fact to be referable to the rule already given which permits the agent to sue where he has contracted personally.

[41] Thus, for example, in New York, where there are many cases holding that a mere agent, having no interest and not within the statute as the trustee of an express trust, cannot sue, (see Barkley v. Wolfskehl, 25 Misc. 420, 54 N. Y. Supp. 934; Bell v. Tilden, 16 Hun 346; Iselin v. Rowlands, 30 Hun 488; Hays v. Hathorn, 74 N. Y. 486.) It is also held that an auctioneer has such a special property or interest in the subject-matter of the sale that he may sue in his own name; Minturn v. Main, 7 N. Y. 220.

[42] The case most frequently cited to sustain this proposition is Williams v. Millington, 1 H. Bl. 81. In this case the plaintiff, an auctioneer, had sold goods upon the premises of the owner, who was described as such in the announcement of the sale and the catalogue of the goods. The defendant bought certain of the goods and they were placed in his cart. Defendant thereupon put into the hands of the plaintiff a sum of money representing part of the price and a receipt for a debt which he claimed the owner owed him covering the rest of the price, and immediately drove off with the goods. The owner refused to recognize the receipt as part payment and the plaintiff thereupon paid him the amount represented by it. Plaintiff then brought this action of assumpsit to recover from the defendant such amount. It was held that the action might be maintained. Lord Loughborough, C. J., put the case upon the ground, "that an auctioneer has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction room; for on the premises of the owner, an actual possession is given to the auctioneer and his servants, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment. If it be otherwise the auctioneer gives credit to the vendee entirely at his own risk." Heath, J., said, "the possession is in the auctioneer and it is he who makes the contract; if they should be stolen he might maintain trespass or an indictment for larceny; he therefore has a special property in them, which is all that is necessary to support this action." Wilson, J., concurred with some hesitation. He said, "I think the verdict right because the defendant having contracted with the plaintiff

Nevertheless, this rule is constantly repeated in the books and a reference to the cases which have been wholly or partially based upon it may be desirable.

SEC. 14.——Under this rule it has been held that a mere interest in commissions to be earned would not, of itself, be sufficient;[43] but the rule must be limited to those cases in which the agent has a lien upon, or a special property in, the subject-matter.[44] In pursuance of this rule it has been held that cotton factors who have sold cotton consigned to them may, in their own names, recover the damages resulting from a breach of the contract by the buyer, although they may be bound to pay the damages, when recovered, to their consignors. The factors have a special property in the cotton, and have a lien upon it for their commissions, which commissions attach on the very damages they may recover, and would be increased thereby.[45] So a broker may sue in his own name for the breach of contract to transmit a telegraph message sent by him, and directing the sale of property of his principal, in which the broker has a special interest and for the sale of which he is entitled to a commission.[46] And agents who have a special interest in goods by reason of advances made for freight upon them and who have delivered them to another carrier for further transportation, may maintain an action in their own names against the latter carrier by whose negligence they were injured.[47]

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for the goods shall not be permitted to say that the plaintiff had no right to contract." He was evidently of opinion that the contract was one which might be regarded as having been made in the plaintiff's name and therefore he was entitled to sue upon it.

In Grove v. Dubois, 1 T. R. 112, the contract of insurance was made in the name of a *del credere* broker. In Atkyns v. Amber, 2 Esp. 493, the plaintiff, a factor, to whom timber had been given to sell and pay a debt due him from principal, was allowed to recover on a contract made in his name. In Williams v. Millington, 1 H. Bl. 82, an auctioneer was allowed to recover for goods sold at the disclosed principal's house. In Johnson v. Hudson, 11 East 180, a factor recovered for goods sold. It does not distinctly appear whether he was the nominal party. In Sadler v. Leigh, 4 Camp. 195, the factor was the nominal party. In Morris v. Cleasby, 1 M. & S. 576, the plaintiff was a *del credere* broker with an undisclosed principal.

[43] Fairlie v. Fenton, L. R. 5 Ex. 169; Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946.

[44] United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

[45] Groover v. Warfield, 50 Ga. 644.

[46] United States Tel. Co. v. Gildersleve, *supra*.

[47] Steamboat Co. v. Atkins, 22 Penn. St. 522. To the same effect is

So an auctioneer has such a special property in the goods sold by him that he may maintain an action for the price, though they were sold as the goods of a named principal.[48] *A fortiori* is this true where, by the terms of the sale, the purchase price is to be paid to him.[49]

So a factor has such an interest as will enable him to sue for the price of the goods he sells.[50] But a mere broker cannot sue.[51]

SEC. 15. SAME SUBJECT——PRINCIPAL MAY SUE OR CONTROL ACTION.—As has already been suggested, however, the agent is not the only party who may maintain the action; for, as will be more fully seen in the following chapter, it is a well-settled rule that when a contract, not negotiable or under seal, is made by an agent for his principal, even though the latter were not disclosed, the principal may usually sue upon it instead of the agent. And this right of the principal to sue upon the contract ordinarily takes precedence over that of the agent; the principal being always at liberty to interfere and bring the action in his own name to the exclusion of the agent's right,[52] except where the agent, by lien

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Wolfe v. Mo. Pac. Ry. Co. 97 Mo. 473, 11 S. W. 49, 10 Am. St. R. 331, 3 L. R. A. 539.

[48] Minturn v. Main, 7 N. Y. 220; Hulse v. Young, 16 Johns. (N. Y.) 1; Beller v. Block, 19 Ark. 566; Robinson v. Butler, 4 El. & Bl. 954.

[49] Thompson v. Kelly, 101 Mass. 291, 3 Am. Rep. 353. In Pinkham v. Benton, 62 N. H. 687, plaintiff, an attorney, had several claims in his hands for collection and among these claims a certain judgment. He had made advances to his client relying upon the collection of these several claims for reimbursement. In this situation defendant applied to plaintiff to purchase the judgment. Plaintiff replied that he must obtain his client's consent, and having done so, sold the judgment to defendant. No formal conveyance was entered into, but the plaintiff charged the amount upon his books to the defendant. Defendant not having paid any one for the judgment, plaintiff brings this action to recover the agreed price. It was held that he might maintain the action. The judgment was put upon two grounds, viz.: first, that the defendant's promise was made to plaintiff personally by his client's consent; and secondly, that "plaintiff had an interest or property in the subject-matter of it." If he had such an interest or property, it must have been by virtue of some general lien for the balance of his account, or a special lien upon the judgment for his services in procuring it.

[50] Graham v. Duckwall, 8 Bush (Ky.) 12; Johnson v. Hudson, 11 East 180; Beardsley v. Schmidt, 120 Wis. 405, 98 N. W. 235; Porter v. Schendel, 25 Misc. R. 779, 55 N. Y. Supp. 602; Ladd v. Arkell, 37 N. Y. Super. 35.

[51] Fairlie v. Fenton, L. R. 5 Ex. 169; White v. Chouteau, 10 Barb. (N. Y.) 202; see also Buckbee v. Brown, 21 Wend. (N. Y.) 110.

[52] 1 Chitty on Pleading, 9; Morris v. Cleasby, 1 M. & Sel. 579; Bickerton v. Burrell, 5 M. & Sel. 385; Vischer v. Yates, 11 Johns. (N. Y.) 23; Yates v. Foot, 12 John. (N. Y.) 1; Kelley v. Munson, 7 Mass. 318, 324; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Borrowscale v. Bosworth, 99 Mass. 383;

or otherwise, has an interest or estate in the subject-matter of the action which would be impaired if the principal were allowed to sue. Thus, for example, if a factor has a lien upon the proceeds of goods sold by him to secure him for advances made to his principal, the principal would not be permitted to destroy the factor's security by recovering the proceeds upon which the factor's lien attached.[53] The right of the agent in such a case to sue exists notwithstanding any settlement with the principal,[54] unless the agent has not been prejudiced by the settlement,[55] or unless he has estopped himself from setting up his claim.[56] Obviously, if the agent's claim has been otherwise satisfied by the principal, the principal may recover.[57]

It will be evident that the interest here referred to which will prevent the action by the principal, is not necessarily the same interest which has been referred to in the preceding section as entitling the agent to sue.

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(*To be concluded.*)

Ludwig v. Gillespie, 105 N. Y. 653; Considerant v. Brisbane, 22 N. Y. 389; Schaefer v. Henkel, 75 N. Y. 378; Rowe v. Rand, 111 Ind. 206.

[53] The leading case is Drinkwater v. Goodwin, 1 Cowp. 251. Here a factor made advances to his principal in reliance upon the security of the proceeds of goods which the principal put in the hands of a factor. Before these advances were repaid the principal became insolvent and both his assignees and the factor demanded payment from the purchaser of the goods. The purchaser paid the factor and was sued in this action by the assignees of the principal. *Held,* they were not entitled to recover. To same effect, where defendant sought to set off a claim against the principal in an action by the agent who had made advances to more than the value of the goods sold by him: Young v. Thurber, 91 N. Y. 388. See also Beardsley v. Schmidt, 120 Wis. 405, 98 N. W. 235, 102 Am. St. R. 991.

[54] Dickenson v. Naul, 4 B. & Ad. 638; Robinson v. Rutter, 4 El. & Bl. 954;

[55] See Holmes v. Tutton, 5 El. & Bl. 65; Grice v. Kendrick, 5 L. R. Q. B. 340.

[56] See Coppin v. Walker, 7 Taunt. 237.

[57] Moline Malleable Iron Co. v. York Iron Co., 27 C. C. A. 442, 83 Fed. 66; Grice v. Kendrick, 5 L. R. Q. B. 340; Merrill v. Thomas, 7 Daly (N. Y.) 393.